draft or review various legal documents. It cautioned that Latham "must be able to maintain the highest level of confidential and fiduciary relationship in counseling clients and the Attorney General." Although she was required to obtain supervisory approval for major decisions, Latham's duties were little different from any other line-level quasi-prosecutorial government attorney. That included preparing legal documents that would be filed with the Attorney General's name on them, of course, as well as appearing in court speaking for the Attorney General.

B. Latham became unhappy with the office's handling of a particular case and with the office's consumer-protection policy in general, and she complained about it.

Latham was assigned as co-counsel in litigation against a pest-control company called Allied Pest Control. This case was a followup to a case she had worked on years before, involving the same company. Both cases involved the pest control company's attempt to contractually limit the remedy that consumers could seek if pests returned after treatment. Allied limited its contractual liability to consumers for defective treatments to "re-treatment only," meaning that the company would treat the property again, as opposed to being liable for property damage caused by termites, and the like.

For the second Allied Pest case, Latham had prepared for an elaborate trial that was to include some twenty-two witnesses and 1,400 exhibits. On the eve of trial, Latham's co-counsel was directed to negotiate a settlement. Under that settlement, Allied agreed to be responsible for post-treatment damage. It further agreed to a regime of inspections by the Ohio Department of Agriculture to determine whether any homes suffered post-treatment infestations or damage.

Latham was disappointed to learn that her case was settled, and that she would not get to go to trial, and she vented her frustration in a letter that she directed to the

Attorney General and copied to other supervisors and co-counsel. Latham sent her letter, dated July 18, 1995, to Attorney General Betty D. Montgomery, who had taken office in January 1995. Latham also copied her immediate and next-level supervisors, and copied her co-counsel colleague as well. See Pet. App. at 31a (Item D) (full letter).

Latham's letter railed against the settlement in particular, and against the office's consumer-protection practices in general. She contended that the settlement was an "injustice to consumers" because, she said, Allied was an irresponsible company that had not lived up to past settlements, and Allied might be sold or become insolvent in the future. Moreover, Latham argued, much of Allied's past work was substandard, inspectors were unlikely to discover new damage, and Allied was likely to fight each individual claim of new damage "tooth and nail." Although it was unclear from her letter just how Allied's customers would have been better protected by a judgment than by the settlement agreement, Latham lamented that "a court will never hear" evidence Latham had prepared regarding Allied's shoddy work and failure to make repairs. These facts would "never come to light" because the State had "opted to save a business rather than to protect consumers." *Id.* at 35a. Latham concluded with her broader attack on her bosses' approach to consumer protection:

> The more significant problem is that the Consumer Protection Section is a "no guts" law enforcement agency. Cases are filed with greater emphasis on modifying the supplier's behavior than reimbursing consumers. Class actions . . . are never filed as a matter of policy.

Id. at 36a. Latham concluded that the Allied case should have used as a starting point for a broader effort to reform the pest control industry. *Id.* at 36a–37a (urging that "[e]very pest control company in Ohio" should be challenged to change

practices and that Allied should be made "an example to all the suppliers in that particular business.").

Notably, while Latham disagreed strongly with the office's approach, and went as far as calling it a "no guts" agency, she accused no one in her office of illegal or unethical conduct. She disagreed with the office's discretionary decision to settle the Allied Pest Control case, on which she had worked very hard in preparing for trial. That is, although her complaint had a strident tone, its substance—regarding the advisability of trial versus settlement in a case—is the type of communication that is routine between a government staff lawyer and her superiors. Similarly, her view on whether the office, as a quasi-prosecutorial one, should focus more on deterring violators or on compensating victims is precisely the kind of debate that is replayed daily in prosecutorial and quasi-prosecutorial agencies across the country.

Latham followed up her letter with frequent informal complaints, to her bosses and colleagues alike, about the office's approach to consumer protection issues. Two years later, Latham's new supervisor raised concerns about Latham's job performance and difficult relationships with other staff. Latham countered by maintaining that she was not promoted or more intimately involved in major cases because of her age. Soon another staff member complained about Latham's conduct, and several supervisors and colleagues explained how her entire pattern of behavior was disruptive over a long time. Attorney General Montgomery agreed with their concerns about her ongoing lack of cooperation. Although the more recent disruption, and not the years-old letter, was her concern, she agreed that the letter was representative of the later problems. The letter, with its broad "no guts" accusation, "sort of reflected the whole frustration I had with Mary Pat." Montgomery Dep. at 66. That is, it reflected Latham's insistence on presenting her

policy preferences stridently, and her unwillingness to accept her supervisors' differing policy judgments.

C. Latham was fired and she sued, claiming that she was fired in retaliation for exercising her right to free speech.

Latham was discharged on January 2, 1998. She then sued, in the United States District Court, Southern District of Ohio, naming as defendants the Attorney General's Office, the Attorney General personally, and three other supervisors. She originally sued under an age discrimination theory, and then added a claim under 42 U.S.C. § 1983, alleging among other things that her termination occurred in retaliation for her "no guts" letter, in violation of her rights under the First Amendment.[1] The defendants maintained that Latham's individual opinion regarding whether a particular case should be settled, tried, or expanded was speech "as an employee" that did not address any matter of public concern as required by *Connick v. Myers*, 461 U.S. 138 (1983). Moreover, Latham's "no guts" allegations tended to disrupt "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning," or implicated the maintenance of "discipline by immediate superiors," and therefore was unprotected employee speech under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563, 570 (1968). Nonetheless, the district court denied summary judgment.

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[1] While Latham's age discrimination suit ran against the Office itself, her Section 1983 claim was aimed at the four named individuals: then-Attorney General Betty D. Montgomery; William A. Klatt, then-First Assistant Attorney General; Helen MacMurray, then-Chief of the Consumer Protection Section; and Randall Berning, managing attorney of the Cincinnati Office. The 1983 suit cannot be maintained against the State, of course, see *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 66 (1989), and the Attorney General's Office is an arm of the State. Thus, although the Petition names the Office as a Respondent, only the individuals are Defendants-Respondents now.

D. Both courts below rejected Latham's claim as a matter of law, finding that her role as an Assistant Attorney General was such that the government automatically won the *Pickering* balancing test when an AAG spoke on a policy matter.

A few weeks before Latham's § 1983 claim was scheduled for trial, the Sixth Circuit issued its opinion in *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002). In *Rose*, the Sixth Circuit held that, in performing *Pickering's* balancing test and determining whether certain speech was disruptive, a court could also look to the Court's teachings in the political-affiliation cases. Under *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), *Elrod v. Burns*, 427 U.S. 347 (1976), and similar decisions, public employees may not be subjected to adverse employment actions because of their political affiliations or beliefs. But under *Branti v. Finkel*, 445 U.S. 507, 518 (1980), and its progeny, this rule does not protect employees who occupy positions for which political affiliation is an "appropriate" consideration.

In *Rose*, the Sixth Circuit adopted a rule that looked to an employee's "*Branti*-exempt" status in performing the *Pickering* balancing. The court noted that *Pickering* had considered an employee's status as an important part of the balance, and that "dismissal of an employee in a position which requires loyalty or confidentiality would implicate 'significantly different considerations' than those present in the discharge of a lower-level public employee." *Rose*, 291 F.3d at 922 (quoting *Pickering*, 391 U.S. at 570 n.3). The court noted that the government employer's interest in *Pickering* converged with the government interest in the *Branti* cases: "the government's interest in appointing politically loyal employees to certain positions [under *Branti*] converges with its interest in operating an efficient workplace [under *Pickering*] because loyalty by those employees is an essential requirement for the efficient functioning of the workplace." *Rose*, 291 F.3d at 923. Thus, the court held in

Rose that "where an employee is in a policymaking or confidential position and is terminated for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." *Id.* at 922.

After *Rose* was decided, the district court allowed the defendants to file a supplemental motion for summary judgment, which was granted. Latham appealed, and the United States Court of Appeals for the Sixth Circuit affirmed. *Latham v. Office of the Attorney General*, 395 F.3d 261 (6th Cir. 2005), Pet. App. 3a. The Sixth Circuit agreed with the district court that Latham's speech addressed a "matter of public concern" under *Connick*. Pet. App. 7a. Nonetheless, her claim failed because her speech was disruptive as a matter of law under *Pickering* and *Rose*.

In *Latham*, the Sixth Circuit repeated its *Rose* reasoning, including what it saw as a practical reason to look at an employee's *Branti*-exempt status in performing the *Pickering* balancing:

> [I]t would seem incongruous for us to suggest that [Latham's] job-related speech would have to rise to the level of outright rebellion before termination would be valid under the First Amendment, when the same employee could be fired merely due to affiliation with an opposing political party, whether or not the employee ever evinces any policy disagreement with the party in power. In either case, a confidential or policymaking employee would have, under *Elrod*, *Branti*, and *Rose*, placed himself in a position such that his State employer might not be able to trust him to implement fully the employer's policies.

Id. at 10a–11a. Because *Rose* already set that standard, the main question was whether Latham's position was one involving confidentiality and policymaking, and thus whether

the job was one for which the government's interest in loyal employees was high. The court concluded that she did have such a position. *Id.* at 16a–17a. The court therefore upheld the grant of summary judgment against her. Latham's petition for rehearing and rehearing *en banc* was denied. *Id.* at 1a. This petition ensued.

REASONS FOR DENYING THE WRIT

The Petition should be denied for several reasons. First, the decision below is nothing exceptional. It flows naturally from the Court's precedents, as the Court has always looked to a speaker's role when performing a *Pickering* balancing. Most circuits follow an identical rule, and the minor deviation in precise formulation in the circuits is so marginal that it is not worthy of review. Second, Latham's real complaint seems to be her belief that the courts below should not have found her role as an Assistant Attorney General to be one involving confidentiality and policymaking—but that issue is factbound and not certworthy. Finally, the Court need not wait to resolve the pending case of *Garcetti v. Cabellos*, No. 04-473, to deny this Petition.

A. The decision below is not novel or exceptional, as it follows this Court's precedent and is consistent with the approach followed in most or all circuits.

1. The Court has always considered an employee's position to be a key factor in the *Pickering* balance, so the Sixth Circuit's approach flows naturally from that principle.

Latham claims that the Sixth Circuit's approach is "inconsistent with" the Court's *Pickering* cases, for, in her view, the Circuit improperly imported *Branti* principles into the *Pickering* context. But the Sixth Circuit's view is not at all inconsistent with *Pickering* and its progeny, which have always given heavy weight to a speaker's role when determining if speech is disruptive. To be sure, the Court has

never mandated a rule such as that adopted by the Sixth Circuit, but that rule is perfectly consistent with what the Court has done.

The *Pickering* Court stressed the importance of an employee's role, and his relationship with other employees, in determining whether his speech was protected. 391 U.S. at 569–70. The Court applied that principle in evaluating Mr. Pickering's job as a teacher. The Court explained that his speech criticized the school board, so he did not criticize anyone with whom he regularly worked. *Id.* at 569–70. Thus, his speech did not implicate questions of discipline by superiors, or harmony among co-workers. *Id.* at 570. Further, his employment relationship with the board and the superintendent were not "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* Because the teacher did not have the type of employment relationship that called for such "personal loyalty," and because of the nature of the statements at issue, the Court held that the teacher's statements were protected.

Notably, the Court in *Pickering* did more than stress the importance of an employee's position and the nature of her employment relationships; it specifically commented that in some future cases, the employee's job alone could be determinative. The Court observed that "[i]t is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." *Id.*, 391 U.S. at 570 n.3.[2] Further, the Court noted that, along with confidentiality, the nature of a personal relationship might be enough to tilt the balance against an

[2] There, the Court spoke in terms of "even completely correct public statements" because another issue in *Pickering* was whether the statements involved were true or false. The bottom line is that the Court allowed that, for some employees, any statement might warrant dismissal.

employee, regardless of the statement's content. The Court said that in some public positions, "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them." *Id.*

Thus, *Pickering* established at the beginning that an employee's position in an office would be critical, and perhaps conclusive, and the Court elaborated on that importance in *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin*, a "clerical employee in a county Constable's office" was fired for remarking, after an attempted presidential assassination, that "If they go for him again, I hope they get him." *Id.* at 379–80. In holding that such a statement was protected free speech, and the firing unjustified, the Court relied almost solely on the employee's status as a clerical employee. The Court held that where "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390–91.

Thus *Rankin*, which says that the State's interest is "minimal" when an employee "serves no confidential, policymaking, or public contact role," easily implies that the opposite statement also holds true. Where an employee does serve such a role, the state's interest is maximal.

Consequently, the Sixth Circuit's *Rose* rule, which says that the government automatically wins the *Pickering* balancing test when certain employees speak out on policy matters, is nothing more than a natural application of what the Court said in *Pickering* and *Rankin*. The Court had already previewed the *Rose* approach in *Pickering*, when it spoke of "positions in public employment" for which the need for confidentiality would be paramount. And the Court applied the same approach at the other end of the spectrum in *Rankin* in saying that the government's interest was minimal

regarding clerical employees' speech. At most, what *Rose* does is to crystallize the approach into a rule. But as explained below, that does not differ much, in the end, from giving great weight to an employee's status, as in *Pickering* and *Rankin*. Indeed, although the Sixth Circuit used the shorthand of *Branti* terminology, and referred to the interaction between the free-speech and free-association cases, the *Rose* rule could easily have been developed from *Pickering* and *Rankin* even if *Branti* and the political-affiliation cases did not exist.

Latham says that both *Pickering* and *Rankin* rejected bright-line rules, and that *Rose* adopts one, so that the latter conflicts with the former—but she is wrong. *Pickering* rejected a per-se rule only insofar as it rejected the idea that any *one* rule could govern *all* speech cases. That says nothing about whether rules or presumptions could be adopted to govern recurring subcategories of cases; e.g., whether certain clerical employees will often win the balancing, as in *Rankin*, or whether other higher-level employees will presumptively lose, as in *Rose*. And *Rose* makes clear that the *Pickering* test is still used, and that the rule the Sixth Circuit adopted is simply a way to perform the balancing, not a substitute for it. *Rose*, 291 F.3d at 922–23.

Further, *Rose* did not adopt a bright-line test concerning *all* speech by policymaking employees. The Sixth Circuit requires that the speech must concern policy or political matters for the employer-protection to apply. *Id.* at 923 & n.3. The Circuit explained that where a policymaking employee disagrees with the boss *on policy*, the resulting disruption is *always* enough to tilt the *Pickering* balance against the employee. But, the court reminded, the requirement that the speech must implicate policy was critical, not superfluous, "because it is possible to conceive of situations where the government might terminate an employee for speech *completely unrelated to the working*

relationship and thus would lack" justification. *Id.* at 923 n.3 (emphasis added).

This reservation is similar to one in *Rankin*. There, the Court's approach might seem to insulate most clerical employees' speech within the office, as such speech typically would not be internally disruptive. But the Court expressly reserved room for other categories of cases, in which public speech might injure the employer. "This is not to say that clerical employees are insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer." *Rankin*, 483 U.S. at 391 n.18 (citing case in which a clerical employee in sheriff's office injured employer by announcing the employee's Ku Klux Klan affiliation on television news). Similarly, just as *Rankin* notes that some categories of speech might be unprotected, even by clerical employees, *Rose* notes that some speech by policymaking employees, such as speech that does not reflect a policy issue, might be protected. Thus, as noted above, *Rose* is entirely consistent with, and indeed flows naturally from, *Pickering* and *Rankin*.

Latham also complains that the Sixth Circuit used *Branti*-based concepts in resolving her *Pickering* claim, but that complaint raises no real problems, as the court's use of *Branti* is sensible both doctrinally and pragamatically. As a matter of doctrine, looking to *Branti* is logical because the political affiliation cases, just like the speech cases, involve the identical government interest: the interest in providing efficient government services, which often requires that a management team and certain employees share and support the elected official's policy goals. Regardless of whether that government interest is weighed against an employee's "free speech" interest, or against the employee's "free association" interest, it makes sense to note that evaluation of the government's interest will run the same in either case. If a certain fact pattern does not raise a strong government

interest, then it just doesn't, regardless of what is in the other column. Nor are the employee interests that different. In fact, *Elrod*, the case that first adopted protection for an employee's political affiliation, expressly cited a *Pickering* free speech case as support for the new rule. *Elrod*, 427 U.S. at 358 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)).

Equally important, aligning the *Branti* and *Pickering* analyses for policymaking employees makes sense for practical reasons. As the Sixth Circuit explained, "it would make little sense to permit the government to preemptively dismiss employees on the basis of political affiliation alone, while restricting its ability to respond to an overt act of disloyalty by an employee in the same position." *Rose*, 291 F.3d at 922. That is, if a *Branti*-exempt employee *could* receive protection under *Pickering* for policy-based speech, then an officeholder would face an odd situation. She may fire all of the silent policymaking employees wholesale on day one of taking office, based solely on political affiliation. But she delays a bit, any employee who starts to loudly complain might be protected, while the still-silent employees in identical jobs remain open to being fired under *Branti*. That would not only be illogical, but it would create a strong incentive for officeholder to exercise *Branti* rights immediately and "clean house" as broadly as the law allows, rather than taking a more flexible approach.

In sum, the Sixth Circuit's approach is reasonable as a matter of "pure *Pickering*" law, and that good sense is further confirmed by the principles animating *Branti*. As the Circuit summed it up,

> In short, the rule we adopt today simply recognizes the fact that it is insubordination for an employee whose position requires loyalty to speak on job-related issues in a manner contrary to the position of his employer, and, as the Supreme Court has recognized, "employees may always be

> discharged for good cause, such as insubordination . . . ." *Elrod*, 427 U.S. at 366. In this situation an individualized balancing of interests is unnecessary.

Id. at 923.

This common-sense notion does not warrant review as a "conflict" with the Court's precedent, and as shown below, no meaningful circuit split exists on this issue, either.

2. The circuits uniformly give great weight to an employee's rank or role in *Pickering* cases, and the minor variations in formulae do not amount to a circuit split.

Latham argues that certiorari is needed here to resolve a "clear and recognized" circuit split over whether an employee's job status may be given conclusive status within the *Pickering* balancing test. She lays out her own taxonomy of how the competing "camps" are aligned, saying that "two general schools of thought" exist, "as well as a number of subcategories, caveats and inconsistencies." Pet. at 16. She takes issue with the implications of some of those "caveats," see, e.g., *id.* at 17 n.8, while she disagrees with other courts over whether this or that court belongs in this or that camp, *id.* at 17 n.9.

The answer to all these quibbles is that Latham simply misperceives the meaning of several courts' holdings, so she sees controversy where none lurks. Properly understood, the circuits all agree on the general principle at issue, and almost all of them agree even on the specifics of the rule to apply. Even more important, though, is that even the court that most clearly "splits" with the Sixth does so in such a marginal way that the split is a purely academic one, which will rarely, if ever, matter in *any* case, and surely not in this one.

While we dispute Latham's classification of several circuits, as detailed below, we agree with Latham's basic

description of the Seventh Circuit as agreeing with the Sixth Circuit, and of the Second Circuit as disagreeing, to some degree, with the Sixth. See Pet. at 16–17. The Seventh Circuit, like the Sixth, applies a rule whereby the employee automatically loses a *Pickering* claim if the employee is *Branti*-exempt, as long as the speech at issue involves policy or politics. *Bonds v. Milwaukee County*, 203 F.3d 969, 977–79 (7th Cir. 2001). And the Second Circuit has, as Latham says, declined to adopt the principle as a dispositive rule. See Pet. at 17–18 (citing *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997)). But the other circuits do not line up as Latham says, but before detailing those other circuits, it is more important to explain the nature of the disagreement between the Second Circuit and the Sixth, so that the others can be put in better perspective.

The marginal nature of the "split" is best demonstrated by comparing the Second Circuit's approach to the Sixth Circuit's, as all observers categorize the Second Circuit as "opposed" to the Sixth Circuit's approach, and Latham does not identify any other circuit as being "more" hospitable to her position than the Second Circuit is. See Pet. at 17; *McEvoy*, 124 F.3d at 103; *Rose*, 291 F.3d at 921 (describing Second Circuit approach as different). In *McEvoy*, the Second Circuit held that "the policymaking status of the discharged or demoted employee is very significant in the *Pickering* balance, but not conclusive." 124 F.3d at 103. Thus, that court did, to be sure, expressly reject the Sixth Circuit's rule-based approach, under which an employee's status is, indeed, conclusive, at least where the speech concerns policy. But the Second Circuit not only explained that it would give the employee's status "great weight," but it further explained that in its own view, that weight would be so great that it would be conclusive in "most cases," leaving a plaintiff's victory an "unlikely" event in that Circuit:

> Indeed, where the employee holds an extremely confidential or highly placed advisory position, it

> ***would be unlikely*** if the *Pickering* balance were to be struck in his favor. The tremendous disruption to the public workplace likely to result from the critical speech of such an employee would ***in most cases*** outweigh any First Amendment interests possessed by that employee.

Id. at 103 (emphasis added). Thus, all that the Second Circuit has done, in disagreeing with the Sixth, is to leave the door cracked open a bit, allowing a narrow space that the Second Circuit itself sees as probably irrelevant.

Consequently, the issue presented here is an academic debate that may never warrant review. Or, at the very least, the court should await a vehicle where the plaintiff would at least potentially slip through the crack that the Second Circuit allows. This case is not such a vehicle, for, as detailed below in Part B, Latham needs to also persuade the Court to reverse the Sixth Circuit's evaluation of her job as a policymaking one, or the difference between the *Rose* and *McEvoy* approaches does not matter to her.

Moreover, given that the space between even the Second and Sixth Circuits is near zero, it may not matter whether the other circuits agree with the Second or the Sixth. Again, Latham does not suggest that any circuit is more plaintiff-friendly than the Second. Thus, so as long as the Second differs little from the Sixth, it should not matter whether the remaining circuits align perfectly with the Second or Sixth, or land someplace in between, due to some "caveat" or subtlety. Nor should it matter whether the marginally-separated "sides" are aligned four-to-five, or four-to-one. Nevertheless, for accuracy's sake, we explain below how Latham's taxonomy is flawed, as in truth, no other circuit stands with the Second, and the other circuits either agree with the Sixth or have not addressed the issue.

Latham errs in categorizing the First Circuit as agreeing with the Second, when in fact, the First Circuit has plainly

adopted a standard identical to the Sixth Circuit's. See Pet. at 17 & n.9 (citing *Flynn v. City of Boston*, 140 F.3d 42 (1st Cir. 1998)); *Rose*, 291 F.3d at 922 (citing *Flynn* as using same rule as in *Rose*). Latham claims that *Flynn* stops shy of a dispositive rule based on the employee's status, so that the First Circuit's approach tracks the Second Circuit's. But the language in *Flynn* shows that Latham is wrong:

> [W]e think it is a reasonable ***working rule*** that, where the employee is subject to discharge for political reasons under the *Elrod* and *Branti* cases, a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position. Indeed, ***without this congruence, the latitude allowed to the superior by the Supreme Court could be effectively nullified.***

Flynn, 140 F.3d at 47 (emphases added). As this language demonstrates, the First Circuit adopted a "working rule" in favor of the employer, and it also raised the same common-sense concern that the Sixth Circuit did in *Rose:* that it would make little sense to allow the boss to fire a *Branti*-level employee for being in the wrong party, but not allow the boss to fire that same employee for expressing a disagreeable policy view.

Latham miscategorizes the First Circuit based on her misunderstanding of a key concept, on which the First and Sixth Circuits (and others) *agree fully:* the need to limit the *Rose/Flynn* rule to cases in which the employee's speech actually involves *policy issues*. In *Flynn,* the First Circuit explained that its rule "does not mean that anything goes for policy-related positions: this would be a different case if an executive were fired for reporting a crime or fraud or for expressing adherence to one church or another." 140 F.3d at

47. Latham cites only the first clause in that sentence, in which the First Circuit contrasted the "anything goes" view to its own. Based on that selective snippet, Latham says that the First Circuit "preserve[ed] the balancing test" and rejected a categorical rule. See Pet. at 18 n.9. But what *Flynn* did, just as *Rose* did, was to simultaneously *adopt* a categorical rule for cases involving policy-related speech by *Branti*-level employees, while categorically excluding from that rule those cases in which the speech did not involve policy or political differences, e.g., reporting a crime.[3]

Latham also errs in citing a later First Circuit case, *Padilla-Garcia v. Rodriguez*, 212 F.3d 69 (1st Cir. 2000), as supporting her misreading of *Flynn*. See Pet. at 18 n.8. That later case makes clear that *Flynn* had indeed adopted a mechanical rule against allowing *Pickering* claims, where the speech involves policy, for "policymakers . . . who were also 'subject to discharge for political reasons under the *Elrod* and *Branti* cases.'" *Padilla-Garcia,* 212 F.3d at 79 (quoting *Flynn*, 140 F.3d at 47). The court did not allow the employer

[3] In addition, this same point not only shows why the First Circuit's rule is identical to the Sixth Circuit's, but it also shows why Latham misses the mark in her "separate" argument, in her footnote 8, regarding whether the "policy issue" requirement in *Rose* really means anything. Latham says that *Rose's* "policy issue" requirement is likely meaningless because it probably converges with *Pickering's* initial requirement that an employee's speech must involve a "matter of public concern" to be protected in the first place. Thus, in Latham's view, "any speech worthy of First Amendment protection is effectively subject to the bright line rule adopted by the Sixth and Seventh Circuits," so that the employee loses. But a "policy issue" is *not* the same as a "matter of public concern," as shown by the First Circuit's example of reporting a crime. That would surely involve a public concern, thus triggering *Pickering* protection, but it would not involve a *policy* disagreement, so the employee would not be excluded from protection under *Flynn* in the First Circuit, or under *Rose* in the Sixth, or under *Bonds* in the Seventh. Thus, Latham's complaint about this "wrinkle," in footnote 8, and her dispute the proper categorization of the First Circuit, in footnote 9, cancel each other out.

in *Padilla-Garcia* to take advantage of the *Flynn* rule for the simple reason that the employer *waived the issue below:* "it is fatal to the appellees' position that they did not argue before the district court that Padilla-Garcia[] . . . was a policymaking or confidential official subject to termination for her political views under the *Elrod/Branti* exception." *Id.* Thus, Latham's suggestion that *Padilla-Garcia* "confirms [her] reading of *Flynn*" is surely mistaken. See Pet. at 18 n.9.

Latham's parade of miscategorization marches on, as she also places the Third, Fifth, and Tenth Circuits all in her favored "camp," along with the Second, of rejecting the Sixth Circuit's view. None of those three courts has squarely aligned itself with the Second Circuit's rejection of the Sixth/Seventh view, and in fact, all have suggested, to some degree, that they agree with the Sixth and Seventh Circuits.

The Third Circuit leaned heavily in the Sixth Circuit's direction, but without clear resolution, in *Curinga v. City of Clairton*, 357 F.3d 305 (3d Cir. 2004). In *Curinga*, the court said that "[n]ot only the [*Pickering*] balancing, but the *outcome* as well, *may be inevitable* because the public employer's interest may weigh so heavily that no other outcome is possible." *Id.* at 312 (emphasis added). And noting the *Rose* decision, the Third Circuit said that "[w]hether or not this can be decided as a matter or law, the government's interest in these kinds of cases is likely dispositive." *Id.* at 312 n.5. Thus, the Third Circuit is probably best categorized as on the fence, as it agrees that the government interest is "likely dispositive," but still refers to "whether or not" this tilt can be embodied as a "matter of law." The "whether or not" shows that it has not yet joined the Second Circuit in disclaiming the adoption of a rule. (And of course, as noted above in our discussion of the

Second Circuit, even *that* view differs only at the extreme margin, if ever.)[4]

The Fifth Circuit's view seems similar to the Third's, i.e., leaning heavily, but not committed:

> In determining where this case should fall, in order to formulate and apply the proper balancing, we note that cases involving public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, where the government's interests more easily outweigh the employee's.

Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 994 (5th Cir. 1992). Thus, while it speaks of a spectrum, it perhaps leaves room for a line at the far end of the spectrum, so that it might join the Sixth Circuit. But *Kinsey* does not reject having a line, as *McEvoy* does.

Latham aligns the Fifth Circuit with the Second on the basis of a different case, *Gentry v. Lowndes County*, 337 F.3d 481 (5th Cir. 2003), but *Gentry* does not commit to the Second Circuit's view. *Gentry* repeats *Kinsey's* teaching, and more important, *Gentry* dealt primarily with what the court called a "hybrid" case of speech and political affiliation, not a pure speech claim. The court mostly discussed the plaintiffs' activity in campaigning against their boss, which is a political activity/affiliation claim; while as to the pure *Pickering* claim that also existed in *Gentry*, the court simply

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[4] Latham also misconstrues *Curinga* in another respect. Latham cites that case as purportedly noting a circuit split and as grouping the circuits into two camps. See Cert Pet. at 15–16. But that discussion in *Curinga*, and that grouping of the circuits, did not concern the issue presented here, regarding the reference to *Branti*-exempt status in resolving a *Pickering* claim. Rather, *Curinga* there described a split over an antecedent question regarding whether a pure *Branti* approach, or *Pickering* instead, governed those cases in which employees campaign against their officeholder-employers. See *Curinga*, 357 F.3d at 313 n.8. That distinct issue is not raised here.

remanded to first resolve several other *Pickering* issues. *See id.* at 489.

The Tenth Circuit did announce its position in *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), as Latham cites, but the court there did not side with the Second Circuit, and in fact, it suggested that it would agree with the Seventh:

> We agree with the Seventh Circuit that, "although an employee's status as a policymaker bears considerable attention when weighing the interests of the government, the policymaking employee exception does not apply and courts must apply *Pickering* balancing when the speech at issue does not implicate the employee's politics or substantive policy viewpoints."

Id. at 1139 (quoting *Bonds*, 207 F.3d at 979). The *Barker* court did not apply a per se rule against the employee in that case, however, because the employee's speech **was not related to policy** or politics:

> Accordingly, in this case, a *Pickering/Connick* analysis could appropriately be applied to Ms. Barker's speech on a matter of public concern *unrelated to her politics or substantive policy positions*, even though she is also a policymaking employee to whom the *Elrod/Branti* line of cases applies."

Id. (emphasis added). Thus, the Tenth Circuit did not, as the Second Circuit did, reject the idea of adopting a rule like *Rose*. To the extent that it stated its agreement with the Seventh, and slotted the employer in *Barker* under pure *Pickering* because her speech was *not* policy-related, the Tenth Circuit is in line with the Sixth and Seventh. Indeed, that is how the Sixth Circuit viewed the Tenth. *Rose*, 291 F.3d at 921–22.

On the "other" side, we agree with Latham that the Seventh Circuit's view is identical to the Sixth's, but we disagree with her placement of the Fourth and Ninth, although that disagreement does not affect Latham's argument for review. As for the Ninth, that court is actually *more* employer-protective. *Id.* at 922. The Ninth Circuit's view in *Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), gives the public employer an automatic win *whenever* a *Branti*-exempt employee files a *Pickering* claim; the Ninth Circuit did not add the caveat that the speech must involve policy. *Id.* at 1331–32. Of course, the Ninth Circuit may have skipped that caveat because it did not have such a non-policy case before it, so perhaps that exception-to-the-exception will arise later. But that difference does not help Latham, for, since she loses under the Sixth Circuit rule, she can have no stake in a battle between one view that defeats her claim and another that is even more employer-deferential.

As for the Fourth Circuit, the case that Latham cites does not in any way discuss how to evaluate a *Pickering* claim, whether based on employee status or any other issue. See Pet. at 16 (citing *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc)). The court there treated a certain claim as a pure *Branti* claim, and did not resolve the claim as a *Pickering* claim at all. See *id.* at 1160 ("The deputies' complaint is properly analyzed under" *Elrod* and *Branti*); *id.* at 1165 (Gribbon Motz, J., dissenting) ("The majority . . . ignores altogether the *Connick-Pickering* claim.").

In sum, the split that Latham describes does not exist. She does not have several circuits on "her" side, just the Second Circuit, and even that view would not help her cause. As the Second Circuit made clear, few if any *Branti*-exempt employees will ever have a *Pickering* claim in the Circuit. But Latham's real complaint, as explained in Part B below, is not whether *Branti*-level employees automatically lose, or just almost-definitely lose—her real complaint is that she was

ever categorized as such an employee. And that, as shown below, it not a certworthy issue, either.[5]

B. Latham's real complaint is not whether the proper rule is a "pure" balancing test or a categorical approach based on an employee's role; her real dispute is how her job was categorized, and that issue is not certworthy.

At the end of the day, Latham's real complaint is not with the Sixth Circuit's adoption of the *Rose* rule, but with the decision it made regarding her status as a policy-making employee. That is, her dispute is not over whether *Branti*-exempt employees should *automatically* lose on *Pickering* claims (when they speak on policy issues), or whether such employees should merely face a very uphill battle, as in the Second Circuit. Rather, her dispute is over whether her position as an Assistant Attorney General should be viewed as *Branti*-exempt, and thus whether she is over the line that *Rose* drew. Or, put another way, if she could persuade the Court to adopt the Second Circuit's *McEvoy* approach, she would still lose—because her status as a confidential, policy-making employee would carry overwhelming weight—unless she could also persuade the Court to reverse the Sixth Circuit's determination regarding her status.

Thus, Latham's real question presented seems to be "whether an assistant attorney general serves in a confidential or policymaking role, or is like a clerical worker." Or, as our second question presented asks, is an "assistant attorney

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[5] Nor does it matter that the district court initially denied summary judgment for the defendants, and granted summary judgment after *Rose*. The earlier denial of summary judgment did not at all deal with the issue of Latham's status and its effect on the *Pickering* balance. Rather, that denial dealt with issues such as whether her speech raised a matter of public concern, whether she was fired for other reasons anyway, and whether her speech was disruptive (based on its content, not her status). And any difference in approach between the district court and the circuit is of course not certworthy.

general, who speaks for the Attorney General in court and assists the Attorney General in implementing public policy, a confidential or policymaking employee." *That* question does not warrant review, either, for several reasons.

First, the circuit courts are virtually unanimous in finding that government lawyers, at least those who represent the State's interests, are "confidential" or "policymaking" employees.[6] The only clear exception is for public defenders who, unlike Latham, mainly represent the interests of their individual clients, not the interests of their government employers. *Branti v. Finkel*, 445 U.S. 507 (1980) (public defender); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir.) (assistant public defenders). Aside from the public defender cases, the only disagreement comes from two district court decisions rendered more than 20 years ago involving social service attorneys.[7] While Latham cites different formulations that the circuits use, those formulas are substantially similar in general, and are particularly convergent when it comes to classifying government lawyers such as Latham.

Nor can Latham draw support from the fact that *Connick* involved an Assistant District Attorney. See Pet. at 10. That is because the Court resolved *Connick* primarily upon the grounds that the speech there, for the most part, did not involve a matter of public concern, but was "most accurately characterized as an employee grievance concerning internal office policy." *Connick*, 461 U.S. at 154. To the extent that the speech there marginally touched on

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[6] *Collins v. Voinovich*, 150 F.3d 575, 578 (6th Cir. 1998) (assistant in-house counsel for the Ohio Lottery Commission); *Adler v. Pataki*, 185 F.3d 35, 46 (2d Cir. 1999) (in-house counsel); *Americanos v. Carter*, 74 F.3d 138, 141–42 (7th Cir.) (deputy attorney general); *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986) (staff attorney for elected county clerk of court); *Fazio*, 125 F.3d at 1334 (assistant district attorney).

[7] *Tavano v. County of Niagra*, 621 F. Supp. 345 (W.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2nd Cir. 1986) (table) (assistant county attorney); *Layden v. Costello*, 517 F. Supp. 860 (N.D. N.Y. 1981) (in-house attorney).

public concerns, the Court rejected the claim based on the disruption it caused and the harm to close working relationships. See *id.* Thus, Latham has not cited cases in which government attorneys succeed in maintaining *Pickering* claims.

Therefore, Latham's argument that she is not a *Branti*-exempt "confidential" employee, while essential to the ultimate success of her claim, does not warrant review. Moreover, if Latham were somehow right she is *not* "confidential," then the Sixth Circuit's own *Rose* rule would no longer prevent her from recovery on her claim. But in that case, Latham's questions regarding the *adoption* of *Rose,* as opposed to its *application* to her, would not even be truly presented in her case. Thus, although she raises academically interesting points, at the end of the day, her *Rose* questions mean nothing unless she *also* wins the issue of re-categorizing her job, but if she does succeed at the latter, then she no longer raises the *Rose* question. Thus, review is not warranted.

C. The pending *Garcetti* case provides no reason to grant *certiorari* here.

Latham also says that the Court should grant review here so that her issues may be presented as a companion to, or a followup to, the Court's pending case of *Garcetti v. Ceballos*, No. 04-473. *Garcetti* addresses the first part of the *Connick-Pickering* analysis, i.e., what types of employee speech can be a matter of public concern to trigger *Pickering* protection—an issue that precedes application of the balancing test. *Garcetti* asks whether speech relates to a matter of public concern under *Connick,* when the employee's speech was uttered "as an employee" in the course of carrying out assigned duties, rather than "as a citizen." *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004).

But *Garcetti* gives no reason to grant *certiorari* here. In *Garcetti,* the Ninth Circuit never reached the *Pickering*

balancing, as it dealt solely with the threshold issue of whether the employee's speech was a matter of public concern. So, at *best* for Latham, a pro-employee decision in *Garcetti* will not help her, other than to confirm the Sixth Circuit's determination on the public concern issue.[8] And if the Court resolves *Garcetti* against the employee there, that might provide yet another ground to *reject* Latham's claim. Latham spoke in the course of her employment, on matters in which she could be expected to report her views to her bosses. Thus, *Garcetti* offers no reason to *grant* review here. But, if the Court is inclined to consider granting, then *Garcetti* is a reason to hold the case rather than grant now, as a *Garcetti* ruling could undermine Latham on the "public concern" issue, making the issues in the Petition irrelevant.

CONCLUSION

The Petition should be denied.

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[8] Nor can *Garcetti*, merely because it involves a government lawyer, be read as implicitly raising the issue of whether public lawyers are *Branti*-exempt, and thus conflicting with the Sixth Circuit's approach. The *Garcetti* issue comes logically before the *Pickering* balance, so the Ninth Circuit has never held that the lawyer in *Garcetti* would survive that next stage. And under *Fazio*, the lawyer's claim likely would not survive.

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No. 05-2

In the Supreme Court of the United States

MARY PATRICK LATHAM,

Petitioner,

v.

THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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I. Introduction

Respondent acknowledges the clear split among the circuits but attempts to downplay its significance through a selective harmonization of the rationales employed by the courts of appeals. Despite this effort, the split among the circuits is deep and clear, leaving the courts in disarray and public employees across the country, uncertain whether they may safely speak out on matters of public concern without fear of retribution because it is entirely unclear who is a "policymaking" or "confidential" employee and how that determination is to be made. Indeed, only five years ago, before the Sixth Circuit's decision in *Rose*, Respondent herein argued that the circuit split was "sharp" and "deep" when it was urging this Court to grant certiorari from a Sixth Circuit decision applying *Pickering*. Only a decision from this Court can resolve this issue. The *Garcetti* case currently before the Court does not present this issue, whereas it is the sole issue presented in this case.

II. Discussion

A. Respondent's Effort To Harmonize The Split Among The Courts of Appeals Ignores The Actual Effect Of The Conflicting Views Announced By The Courts – Different Outcomes In Similar Cases.

Respondent devotes the bulk of its brief – 15 out 18 pages of argument – to explaining why, in its view, the recognized split among the circuits is not terribly significant. To get where it wants to go, Respondent picks and chooses select elements from the decisions of this Court and from the statements of the courts of appeals to weave a complicated but, according to respondent, coherent and unified jurisprudence of public employee First Amendment rights.

To be fair, it is true that the courts have consistently held that the nature of a public employee's job is an important element to be considered in employing the balancing test mandated by *Pickering*. Petitioner does not take issue with this principle. Indeed, the district court applied the *Pickering* balancing test in this case before the Sixth Circuit's decision in *Rose* and easily denied Respondent's motion for summary judgment holding that Ms. Latham's letter was Constitutionally protected speech because it touched on matters of public concern, and that, on the record presented, it could not be held as a matter of law that any alleged disruption it caused in the Attorney General's office outweighed the speech rights at issue. The problem is that *Rose* and the other circuits adopting its bright-line test have not merely expanded on or refined *Pickering*, they have obliterated it by eliminating the need to engage in the case-by-case balancing process mandated by that decision in any case in which the label "policymaking" or "confidential" can be applied. Moreover, these courts have actually compounded the problem by failing to delineate any clear standard by which a public employee can discern whether he or she is such an employee, thereby creating a *de facto* deterrent to public employee speech for the many employees uncertain of whether they fall within the hazy realm of "policymaking" or "confidential" as defined by his or her particular circuit.

The history of this case illustrates the fallacy of Respondents' argument. Before *Rose* the case was going to trial following a denial of summary judgment under the well established doctrine announced in *Pickering*. After *Rose*, and on the eve of trial, the district court felt compelled to grant a last minute motion for summary judgment solely because of the change in the law announced in *Rose*. Same case - different outcome *as a matter of law* - this cannot be fairly downplayed as nothing "novel or exceptional" as contended

by Respondents. The same is true in other circuits as noted by four members of the Fourth Circuit:

> In addition to refusing to engage in the proper *Elrod-Branti* analysis and finding *all* (more than 4,600 in 1988) North Carolina deputy sheriffs are policymakers, the majority ignores the deputies' potentially meritorious claim under *Connick* and *Pickering*. Taken together, these holdings make the hiring, firing, promotion, and transfer decisions of North Carolina sheriffs essentially unreviewable.

Jenkins v. Medford, 119 F.3d 1156, 1171 (4th Cir. 1997) (Motz, J., dissenting from *en banc* opinion joined by Judges Hall, Murnaghan and Michael) (emphasis and elipsis in original).

The Attorney General's effort to minimize the significance of the split among the circuits in this case is belied by its own arguments in support of certiorari in a pre-*Rose* decision in which it claimed that "the circuits are sharply divided on the application of *Pickering* to high level public officials." *See* Petition for Writ of Certiorari in *Johnson v. University of Cincinnati*, S.Ct. Case. No. 00-577, October 13, 2000, 2000 WL 34000722 * 11. In *Johnson v. University of Cincinnati*, 215 F.3d 561, 583-85 (6th Cir. 2000), the Sixth Circuit applied *Pickering* and held that a university vice president could maintain a First Amendment retaliation claim. In urging this Court to grant a writ of certiorari, the Attorney General of the State of Ohio, a respondent herein, argued that "the federal courts are deeply divided concerning the proper test to apply in a case like this one, where a high-level or confidential public employee is dismissed for criticizing the agency's implementation of its own policies." *Id.* Indeed, according to Respondent, "resolution of this circuit conflict"

was "necessary to uphold the authority of public agencies to dismiss senior administrators who disagree with their agencies on policy matters." *Id.* at * 16. Now that the Sixth Circuit has adopted the rule Respondent was urging upon the Supreme Court in 2000, the circuit split which it described then as "sharp" and "deep" is evidently not so significant. To the contrary, however, the situation has not changed since then with the exception of the Sixth Circuit's decision to join the Seventh and Ninth Circuits in adopting a categorical, bright-line rule in *Rose*.

Respondent completely declined to address the deterrent effect that the new rule announced in *Rose* and by other circuits will have on public employee speech. Indeed, Respondent does not even discuss the Court's decision in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995). Not surprisingly, however, public employers have already begun to attempt to use the bright-line rule as a weapon to justify overt prior restraints on public employee speech. *See Wernsing v. Thompson*, ___ F.3d ___, 2005 WL 2174432 *11 (7th Cir., September 9, 2005).[1] Equally or perhaps more invidious is the deterrent to speech that exists under the current state of the law because public employees are left to wonder whether they are "confidential" or "policymaking" employees who can be fired at will for utterances, even constructive private ones such as those at issue in this case, dealing with matters of policy. The understandable result is that employees who are uncertain of

[1] In *Wernsing*, the Illinois Inspector General's office issued a memo advising several employees who had expressed concern about a proposed appointment that they could not communicate with anyone outside the office about matters of policy without prior approval. When the employees inquired about the scope of the restriction, their jobs were threatened. *Id.* *3.

where they stand will remain silent, and there is tremendous confusion about who is a "policymaker" or "confidential" employee. *See e.g. Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005) (holding that board member was not a "policymaker" or "confidential" employee); *Kiddy-Brown v. Blagojevich*, 408F.3d 346 (7th Cir. 2005) (holding that whether position was "confidential" or "policymaking" was fact driven decision); *Jenkins*, supra at 1171 (noting uncertainty of status of thousands of law enforcement officers). If a rule such as that adopted by the Sixth Circuit in *Rose* is to be the law of the land, guidance from the Court is needed to determine to whom it applies. Otherwise, public employers are free to try to mute their employees by applying the "confidential" and "policymaking" labels.

B. Contrary To Respondents' Argument, Petitioner's "Real Complaint" Is Not "How Her Job Was Categorized," But Rather How The Law Was Changed By The Sixth Circuit And Others To Allow Public Employers To Silence And Punish Well Meaning, Dedicated Public Servants Such As Ms. Latham With Impunity.

Respondent tries to marginalize Ms. Latham's arguments by recharacterizing them as an isolated dispute over whether Ms. Latham's position as the lowest ranking professional staff member of the Attorney General's office was properly included within the "confidential" or "policymaking" categories. This misstates the issue. Even taking into consideration the fact that Ms. Latham is an attorney, the district court concluded prior to *Rose* that the balancing required by *Pickering* could not be resolved *as a matter of law* given the value properly accorded her Constitutionally protected speech. Ms. Latham's "real complaint" is that *Rose* changed the law in the Sixth Circuit and made the issue,

which was previously unresolvable as a matter of law because it was bound up with factual determinations, a pure issue of law dictated by the labels purposefully applied by employers without any reference to reality. Ms. Latham's "real complaint" is with the tremendous impact that such a rule of law has on public employees everywhere, herself included, and the loss that we all suffer when well meaning public employees are afraid to speak up about matters of public concern like public safety and corruption.

III. Conclusion

Respondents' effort to downplay what it previously described as a "sharp" and "deep" split among the circuits is convenient now that the Sixth Circuit has adopted the rule it prefers. In reality the split endures and remains "sharp" and "deep." As a result, the law is inconsistent across the country and the free speech rights of public employees have been chilled because employees cannot possibly be expected to determine where they stand, a situation public employers are apt to exploit. The Court's resolution of the issues raised by this case is needed to bring consistency and uniformity to this important area of the law.

Respectfully submitted,

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